THE "AVRO INTERNATIONAL" THE "AVRO VENTURE" "AVRO INTERNATIONAL" (OWNERS OF) v. ARABIAN MARINE BUNKERS SALES CO. LTD. & ANOR.

[C.A. (Wee Chong Jin C.J., Lai Kew Chai & Chua JJ.) November 18, 1987]

[Singapore – Civil Appeal Nos. 35 & 36 of 1986]

Shipping – Admiralty in rem proceedings – Striking out of – Application for – Whether proceedings instituted by respondents properly within the admiralty jurisdiction of court – Unconditional appearances entered – Whether fatal to appellants' claims – High Court (Admiralty Jurisdiction) Act (Cap. 123, 1985 Ed.), s. 4(4).

In this case, two appeals were heard together. One was Civil Appeal No. 35 of 1986 and the other was Civil Appeal No. 36 of 1986. In Civil Appeal No. 35 of 1986, the appellants were the owners of the vessel "Avro International". The respondents were Arabian Marine Bunkers Sales Co. Ltd. In Civil Appeal No. 36 of 1986, the appellants were the owners of the vessel "Avro Venture". The respondents were Forsythe International Limited.

In both these appeals, which were by agreement heard together, the question was whether the appellants as defendants in the High Court and owners of "Avro International" and "Avro Venture" could obtain orders striking out the admiralty *in rem* actions instituted by the respondents as plaintiffs on the ground that the two ships were, at the times the bunkers were supplied by both respondents, bare-boat chartered to Avro International Limited who, and not the appellants, were therefore the party "who would be liable on the claim in an action *in personam*" within the meaning of that expression in section 4(4) of the High Court (Admiralty Jurisdiction) Act (Cap. 123, 1985 Ed.) ("the Act"). Both the appellants had entered unconditional appearances.

The appellants' applications to strike out the actions were dismissed by the Deputy Registrar. Their respective appeals to the High Court were also dismissed because the appellants, having entered unconditional appearances, could not at the threshold stage of the proceedings strike out the actions for want of jurisdiction (see [1987] 1 M.L.J. 16). The appellants appealed to the Court of Appeal.

Held, dismissing both appeals: (1) in the court's view, the respondents had brought their claims within the admiralty jurisdiction of the High Court and that the court had properly applied the case of *The Bilbao* as it was not distinguishable from the matters raised in these appeals;

(2) the effect of entering an unconditional appearance is twofold, *i.e.* (a) it waives any irregularity of the writ or its service; and (b) the defendant is considered to have submitted to the jurisdiction of the court. A defendant who wishes to set aside the writ or its service for non-compliance of the rules of procedure or who wishes to challenge the jurisdiction of the court must therefore enter a conditional appearance. In this case, the appellants' unconditional appearances were fatal to their right to object to jurisdiction.

Cases referred to:

(1). *The Bilbao* (1860) Lush. 149; 3 L.T. 338; 167 E.R. 72.

(2) *Carmel Exporters (Sales) Ltd.* v. *Sea-Land Services Inc.* [1981] 1 All E.R. 984.

(3) *Wilkinson* v. *Barking Corporation* [1948] 1 K.B. 721.

(4) *Rothmans of Pall Mall (Overseas) Ltd.* v. *Saudi Arabian Airlines Corporation* [1980] 3 All E.R. 359.

COURT OF APPEAL.

Lionel Liew (*Said Ahmed Chishty* with him) for the appellants.

Steven Chong for the respondents in Civil Appeal No. 35 of 1986.

Eddy Tong Pu for the respondents in Civil Appeal No. 36 of 1986.

Cur. Adv. Vult.

Lai Kew Chai J. (delivering the judgment of the court): In these two appeals, which were by agreement heard together, the question raised was whether the appellants, as defendants in the High Court and owners of "Avro International" and "Avro Venture", could obtain orders striking out the admiralty *in rem* actions instituted by the respondents, as plaintiffs, on the ground that the two ships were, at the times the bunkers were supplied by both respondents, bare-boat chartered to Avro International Limited who, and not the appellants, were therefore the party "who would be liable on the claim in an action *in personam*" within the meaning of that expression in section 4(4) of the High Court (Admiralty Jurisdiction) Act (Cap. 123, 1985 Ed.) ("the Act"). The appellants' applications to strike out the actions were dismissed by the Deputy Registrar. Their respective appeals to the High Court were also dismissed because the appellants, having entered unconditional appearances, could not at the threshold stage of the proceedings strike out the actions for want of jurisdiction. The High Court relied on *The Bilbao*[1] to which we shall revert. At the adjourned hearing of the appeals in the High Court, the appellants applied for leave to withdraw the unconditional appearances which they had entered. Their applications failed. The appellants brought these appeals before us and at the conclusion of the hearing, we dismissed both appeals with costs.

We now set out the circumstances and our reasons for dismissing both appeals. Between November 1983 and January 1984, both respon-

dents supplied bunkers to the ships "Avro International" and "Avro Venture". In May 1984, the respondents instituted in the High Court admiralty *in rem* actions against the owners of both vessels for recovering the price of the bunkers. On the face of them, the claims fell within paragraph (l) of section 3(1) of the Act. In the following month, both ships were arrested but the ships were promptly released upon the appellants furnishing bank guarantees in terms and amounts accepted by the respondents. In June 1984, both the appellants entered unconditional appearances. Under Order 70 rule 2 of the Rules of Supreme Court ("the R.S.C."), it was provided that the appearance procedure for admiralty cases was the same as in the ordinary cases under Order 12 of the R.S.C. More than five months later, they filed interlocutory applications for orders to strike out and dismiss the respondents' claims and for the return of the bank guarantees duly cancelled by the respondents. As stated earlier, they failed before the Deputy Registrar and the High Court.

The appellants alleged, as deposed to in affidavits and documents filed on their behalf, that Avro Shipping Limited of 80 Broad Street, Monrovia, Liberia had on May 23, 1983 bare-boat chartered the two vessels and as such bare-boat charterers they had through their agents ordered the bunkers from the respondents. Not being the buyers of the bunkers, the appellants therefore submitted that they were not liable *in personam* to pay the price for the same. The appellants further alleged that under the terms of the charter-party, Avro Shipping Limited were granted an option to purchase the vessels at the end of the two-year term or after one year on payment of the balance of the hire. They further claimed that on March 9, 1984 the bare-boat charterers repudiated the charter-party and that as the repudiation of the charter-party was accepted by the appellants, the vessels remained in the beneficial ownership of the appellants, with the ownership thereof at no time passing to Avro Shipping Limited.

Turning to the information published in the *Lloyd's Register,* the appellants alleged that on May 23, 1983 *Lloyd's Register* showed that the appellants were the owners of the vessels and that apart from a letter dated October 20, 1983 advising *Lloyd's Register* of a change in the managers of the ships they claimed that neither they nor their agents had informed *Lloyd's Register* that ownership of the two ships had passed to Avro Shipping Limited. As for the information appearing in the *Lloyd's Register* between November 1983 and February 1984 which stated that Avro Shipping Limited were the owners of the two ships, the appellants claimed that they were unaware of the changes and that they were not in any way responsible for the erroneous entries. The appellants mentioned the fact, as it was, that *Lloyd's Register* depended on a number of sources for their information.

On the other hand, the respondents, in support of their submission that at this threshold stage they merely had to demonstrate a reasonably arguable case, pointed to the fact that the deliveries of the bunkers to "Avro Venture" were accepted by the second engineer, one A.K. Choppa, and that his appointment by Avro Shipping Limited was "as agents" of the owners of the ship "Avro Venture". That Avro Shipping Limited appeared to act as the agents of the owners of "Avro Venture" in the recruitment of an officer of the ship was inconsistent with the alleged bare-boat charter which, like any other bare-boat charter, should and would have required such a charterer to recruit the master, officers and crew for their own account. Without having to go into further contentious details, the respondents contended that at this stage of the proceedings they had shown that the matters in dispute, including the question whether there were in fact bare-boat charters, should be allowed to go for trial.

We turn now to the grounds of appeal canvassed on behalf of the appellants. First, they submitted that the High Court was wrong to have decided on the authority of *The Bilbao*[1] which, they submitted, was distinguishable from the instant case. In that case, the plaintiffs, whose non-sea-going barge was collided into by the defendants' foreign vessel which was entering Victoria Dock on the River Thames, obtained from the admiralty registry a warrant, founded on the usual affidavit, and arrested the vessel. The defendants entered an appearance absolutely. Bail was admitted and "The Bilbao" was released. It was not disputed that before the passing of Act 3 & 4 Vict. c. 65, the English Admiralty Court had no jurisdiction within the body of a county and that that Act, which gave the court jurisdiction only in cases of damages received by any "ship or sea-going vessel", did not confer jurisdiction over damage done to a non-sea-going vessel.

So far as the court's jurisdiction was concerned, however, the owners of the barge relied on sections 527 and 529 of the Merchant Shipping Act 1854 which are reproduced below to highlight the

legal position that the two sections (a) required the application for arrest of a ship to be made to a judge or to other authorities not relevant for present purposes; (b) required the order of arrest of the offending ship to be made by a judge or such authority (which did not include the registrar of the admiralty registry); and (c) contemplated that an action or suit would be instituted subsequent to the arrest.

Section 527 reads:

"Whenever any injury has, in any part of the world, been caused to any property belonging to Her Majesty or to any of Her Majesty's subjects by any foreign ship, if at any time thereafter such ship is found in any port or river of the United Kingdom, or within three miles of the coast thereof, it shall be lawful for the judge of any court of record in the United Kingdom, or for the judge of the High Court of Admiralty, or in Scotland the Court of Session, or the sheriff of the county within whose jurisdiction such ship may be, upon its being shown to him by any person applying summarily that such injury was probably caused by the misconduct or want of skill of the master or mariners of such ship, to issue an order directed to any officer of customs or other officer named by such judge, requiring him to detain such ship until such time as the owner, master or consignee thereof has made satisfaction in respect of such injury, or has given security, to be approved by the judge, to abide the event of any action, suit or other legal proceeding that may be instituted in respect of such injury, and to pay all costs and damages that may be awarded thereon; and any officer of customs or other officer to whom such order is directed shall detain such ship accordingly."

Section 529 reads:

"In any action, suit or other proceeding in relation to such injury, the person so giving security as aforesaid shall be made defendant or defender, and shall be stated to be the owner of the ship that has occasioned such damage; and the production of the order of the judge made in relation to such security shall be conclusive evidence of the liability of such defendant or defender to such action, suit, or other proceeding."

It was submitted on behalf of the owners of "The Bilbao" that none of the procedural requirements were complied with in that case; that the action was commenced by the arrest led by a warrant which was issued as a matter of course by the registrar upon an affidavit used in ordinary cases; and that not even the name of a judge was used.

It was in those circumstances that the Right Hon. Dr. Lushington said at pp. 151 and 152:

"They (the plaintiffs) refer, therefore, to the 527th and following sections of the Merchant Shipping Act 1854. [The learned judge then read section 527.] It is clear that this section gives the court authority to entertain a case like the present; but the defendant's counsel has taken the objection that the Act requires certain formal proceedings to be adopted, which the plaintiffs have not followed. This objection, therefore, is a technical one only: the defendants are forced to admit that the court has jurisdiction; they say only that it has been informally claimed. I do not consider it necessary to examine the value of the objection, because I am of opinion that an objection of this kind comes too late. The defendants have given an absolute appearance to the action: and after that they cannot be allowed to take a mere formal objection to the jurisdiction. It is true that the court has occasionally considered questions of jurisdiction at the hearing, but always with great reluctance, and only where there might be danger of the court proceeding without any jurisdiction at all. The court is necessarily obliged to be careful not to exceed its jurisdiction; but it will not admit, after absolute appearance, objections of a purely technical kind. To do so might be to do great injustice; for the plaintiffs relying upon the absolute appearance have allowed the defendants' vessel to be released on bail. This plea must be struck out."

Learned counsel for the appellants in these appeals submitted that the point raised by the appellants was not one based on any technicality as in *The Bilbao*[1] but was one based on the provisions of sections 4(2) and 4(4) of the Act which went to jurisdiction and that the appellants were not "the person who would be liable on the claim in an action *in personam*" within the meaning of that expression in the second-mentioned section. This submission begs the very question whether the appellants were such a party, a question which the appellants had assumed as proved but which could only be resolved in a trial. On the face of the claims as asserted, the respondents had, in our view, brought their claims within the admiralty jurisdiction of the High Court. It was also our view that the High Court had properly applied *The Bilbao*[1] as it was not distinguishable from the matters raised in these appeals.

The effect of entering an unconditional appearance is twofold: (1) it waives any irregularity of the writ or its service; and (2) the defendant is considered to have submitted to the jurisdiction of the court: see Vol. 1 *The White Book* 1979 Ed. paras 12/1/3. A defendant who wishes to set aside the writ or its service for non-compliance of the rules of procedure or who wishes to challenge the jurisdiction of the court must therefore file a conditional appearance. In *Carmel Exporters (Sales) Ltd.* v. *Sea-Land Services Inc.*,[2] which dealt with the new procedure of "appearance" by the process called "acknowledgement of service" which does not concern us, Robert Goff J. (as he then was) dealt with the differences between the old and new methods whereby a defendant in England could enter appearance. At p. 987, he said:

"Under the old procedure, once a writ had been served on a defendant, if a defendant failed to enter an appearance within the time limited for appearance the plaintiff was entitled (subject to certain exceptions) to enter final judgment against the defendant for a sum not exceeding that claimed in the writ and for costs. On the other hand, if the defendant did enter an appearance, he thereby not only showed his intention to defend the suit but also submitted himself to the jurisdiction of the court. If a defendant wished to challenge the jurisdiction of the court, there were two courses open to him. First he might, with the leave of the court, enter a conditional appearance in the action. This had the effect of preventing the plaintiff from entering judgment in default of appearance, while maintaining the defendant's right to object to the jurisdiction of the court, or indeed to any irregularity in the issue or service of the writ. However, subject to that right, a conditional appearance was a complete appearance to the action for all purposes. Accordingly, on the expiration of the relevant time, if no application had been made by the defendant to set aside the proceedings, or he had made such an application and it had been dismissed, the appearance stood as unconditional and the plaintiff could proceed with the action. So, if a defendant wished to avoid submitting to the jurisdiction, his safer course was not to enter a conditional appearance, but to take the second course open to him, which was to apply before entering an appearance for an order setting aside the proceedings. This was of course the usual application made by a party outside the jurisdiction, served with proceedings by virtue of leave given under RSC Order 11, if that party did not wish to submit to the jurisdiction."

The one exception from the general effect of an unconditional appearance is the situation where a court under any written law lacks jurisdiction to entertain the claim at all, as in *Wilkinson* v. *Barking Corporation.*[3] There, the defendant was allowed to assert the want of jurisdiction of the court although he had entered an unconditional appearance because a statutory tribunal and not the court was vested with the jurisdiction to entertain the claims of superannuation such as the one asserted by the plaintiff. An exception to the effect of an unconditional appearance was made in that case because the court would otherwise have entertained the claim contrary to law. Asquith L.J. stated at p. 725:

"The Supreme Court may by statute lack jurisdiction to deal with a particular matter ... It has, however, jurisdiction to decide whether or not it has jurisdiction to deal with such matters, and by entering an unconditional appearance a litigant submits to the former jurisdiction (which exists) but not to the latter (which does not exist)."

This distinction set this case apart from the present appeals and we did not agree that *Wilkinson*[3] was of any assistance to the appellants.

Learned counsel for the appellants also sought support from *Rothmans of Pall Mall (Overseas) Ltd.* v. *Saudi Arabian Airlines Corporation.*[4] Mustill J. (as he then was) highlighted the distinction we have referred to in *Wilkinson*[3] and for that reason it strengthened the respondents' submission in the present appeals that the appellants' unconditional appearances were fatal to their right to object to jurisdiction.

For these reasons, we dismissed the appeals with costs.

Appeals dismissed.

Solicitors: *Emmanuel & Barker; Drew & Napier; Haridass Ho & Partners.*

YEO BROTHERS CO. (PTE) LTD. v. ATLAS PROPERTIES (PTE) LTD.

[O.C.J. (Lai Kew Chai J.) September 23, 1987]

[Singapore – Originating Summons No. 1178 of 1985]

Land Law – Conveyancing – Sale and purchase of flat – Shortfall in area of 19.07 sq.m. and deficiency of 10.77% – Claim by purchasers for abatement in purchase price – Whether shortfall substantial – Equity – Principles applied – Housing Developers (Control and Licensing) Act (Cap. 130, 1985 Ed.).

Housing Developers – Contract – Misdescription of area – Deficiency of 10.77% – Whether substantial – Housing Developers (Control and Licensing Act) (Cap. 130, 1985 Ed.) – Singapore Law Society's Conditions of Sale, cl. 11 – Purposes of.

Equity – Sale and purchase of flat – Shortfall in area – Whether shortfall substantial – Principles applied.

By an agreement of sale and purchase dated September 21, 1982, the plaintiffs agreed to purchase a flat "estimated to contain a floor area of 177.07 sq.m." from the defendants. On March 13, 1986, the Chief Surveyor approved the final survey plans of the condominium and the area of the flat was duly determined to be 158 sq.m. There was therefore a shortfall in area of 19.07 sq.m. and the deficiency was 10.77%.

In September 1985, the defendants through their solicitors purported to give notice under the agreement for sale and purchase to the plaintiffs to complete the sale and purchase without offering compensation by way of an abatement in the purchase price. The plaintiffs declined to complete without an abatement in the price and they took out an originating summons for a declaration (prayer 1(b)), *inter alia*, that the defendants were not entitled to oblige the plaintiffs to complete the sale and purchase. Alternatively, the defendants were entitled to do so only upon the defendants giving the plaintiffs an abatement in the purchase price being compensation for the deficit in floor area.

The question before the court was whether the misdescription of 10.77% (in percentage terms) or $40,810.56 plus $2,522.80 and the accruing interest (in money terms)